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IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

CITY OF COLUMBIA, *et al.*,

Petitioners,

v.

OMNI OUTDOOR ADVERTISING, INC.,

Respondent.

On Writ of Certiorari To The
United States Court Of Appeals
For The Fourth Circuit

BRIEF OF THE OUTDOOR ADVERTISING
ASSOCIATION OF AMERICA, INC.
AS *AMICUS CURIAE*

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INTEREST OF AMICUS CURIAE

Pursuant to Rule 37.3 of the Rules of this Court, the Outdoor Advertising Association of America, Inc. ("OAAA") has secured the consent of all parties to this litigation to the filing of this brief as AMICUS CURIAE. The brief does not support the position of either party.

The OAAA is the trade association of the standardized outdoor advertising industry. The members of

the OAAA, who comprise a majority of the outdoor advertising companies in the United States, maintain billboards in 7,900 distinct local geographic market areas. The Association's members are predominantly small locally-based businesses. Other members of the OAAA are much larger and operate on a regional or national scale.

The OAAA believes that the standards adopted by the United States Court of Appeals for the Fourth Circuit in the decision below are so vague that, as a practical matter, it is impossible to know when the lawful activity of petitioning the government may lose its First Amendment protection and give rise to a violation of the Sherman Act. This is a matter of vital concern to the outdoor advertising industry which has been severely affected by regulation and must petition government on all levels on a regular basis to insure that it can retain sufficient billboards to remain competitive with other mass media.

In addition, because of the imprecision with which the Court of Appeals has used its "conspiracy" and "sham" standards, a serious shadow has been cast on the ability of interested parties to achieve legislative compromise through petitioning and negotiating with the government where the results may have a potential impact on competition within that industry. Indeed, it is unclear how and to what extent the Fourth Circuit's decision may adversely affect many such compromise measures that have already been implemented in a broad spectrum of localities and states.

The OAAA respectfully submits this brief in order to bring these matters to the Court's attention and to impress upon the Court the critical need for the

establishment of a clear standard under which an act of petitioning the government which is not otherwise illegal, corrupt or coercive will be shielded from antitrust liability under the *Noerr/Pennington* doctrine.

STATEMENT OF THE CASE

In this case, the United States Court of Appeals for the Fourth Circuit found that there was sufficient evidence in the record below to find that the City of Columbia, South Carolina and Columbia Outdoor Advertising, Inc. ("COA") had engaged in a "conspiracy" and a "sham" when COA successfully petitioned the City of Columbia to enact a restrictive billboard ordinance. The Fourth Circuit reached this conclusion despite the apparent lack of evidence of any overt illegal act, such as bribery, corruption or coercion.

The restrictive Columbia ordinance apparently had the effect of preventing a new entrant into the Columbia, South Carolina outdoor advertising market, Omni Outdoor Advertising, Inc., from building outdoor advertising signs in Columbia, while permitting COA to retain its existing signs. Because it found that there was a "conspiracy" and a "sham," the Fourth Circuit held that the actions of COA and the City of Columbia were not protected from antitrust liability by the *Noerr/Pennington* and *Parker v. Brown* doctrines.

SUMMARY OF ARGUMENT

The imposition of stringent federal, state and local land use controls has caused a sharp reduction in the number of billboards in the United States and forced a significant concentration of ownership within the outdoor advertising industry. Because of the imposi-

tion of this comprehensive regulatory structure, outdoor advertising companies are regularly required to petition the legislative and executive branches of government on all levels and to develop ongoing relationships with governmental units in order to prevent new restrictions which would further threaten their continued viability as a principal medium of mass communications.

The Fourth Circuit decision in *Omni Outdoor Advertising, Inc. v. Columbia Outdoor Advertising, Inc.*, 891 F.2d 1127 (4th Cir. 1989), does not provide clear guidelines for determining when the lawful act of petitioning the government metastasizes into a violation of the Sherman Act. It also has had a pronounced chilling effect on conduct once thought to be lawful under the *Noerr/Pennington*¹ and *Parker v. Brown*² doctrines.

Although the OAAA does not support either party in this case, the Association is deeply concerned that a clear standard of conduct emerge from the resolution of this case. The need for such a clear standard becomes obvious by examining the potential impact of the Fourth Circuit's "conspiracy" and "sham" tests on a broad spectrum of negotiated agreements throughout the United States that have been devised jointly by outdoor advertising companies and local governments as an alternative to protracted litigation. OAAA believes that this Court should articulate a standard under which an act of petitioning the government which is not otherwise illegal, corrupt or

¹ *Eastern R.R. Pres. Conf. v. Noerr Motor Freight*, 365 U.S. 127 (1961), and *UMWA v. Pennington*, 381 U.S. 657 (1965).

² *Parker v. Brown*, 317 U.S. 341 (1943).

coercive will be shielded from antitrust liability under the *Noerr/Pennington* doctrine.

ARGUMENT

I. Outdoor Advertising is a Major Medium of Mass Communications

OAAA believes that it can best assist this Court by providing it with an understanding of how the Fourth Circuit's opinion will affect future activities by the outdoor advertising industry as the industry's activities relate to petitioning the government. OAAA also believes that the issues raised by this brief are representative of those that will confront commercial interests that desire to petition the government in the future.

In order to understand the impact of the Fourth Circuit's decision and the need for clarification by this Court of where protected conduct loses the immunity accorded by the *Noerr/Pennington* and *Parker v. Brown* doctrines, it is important to understand certain fundamental facts regarding the outdoor advertising business and the regulatory environment within which this industry operates.

A. The Business Dynamics of the Outdoor Advertising Industry

Billboards have been a primary medium for the dissemination of commercial and non-commercial information since the inception of the United States. Gallo, *The Poster In History*, American Heritage Pub. Co., 1972. Indeed,

[t]he outdoor sign or symbol is a venerable medium for expressing political, social and commercial ideas. From the poster or

"broadside" to the billboard, outdoor signs have played a prominent role throughout American history, rallying support for political and social causes.

Metromedia, Inc. v. San Diego, 453 U.S. 490, 501 (1981) (White, J.) (quoting the dissenting opinion of Justice Clark in *Metromedia v. San Diego*, 26 Cal. 3d 848, 888, 610 P.2d 407, 430-31, 164 Cal. Rptr. 510, 533-34 (1980)).

Despite strong competition from broadcast and print media, billboards remain an important mass medium because of their relatively low cost and the efficiency with which they communicate effectively to the public. Outdoor advertising has also retained its importance because, like all other media, it has certain unique communications capabilities. Thus, the simple statement "Vote for Smith—The People's Choice" would command little attention when broadcast on the radio or interspersed with many other advertisements in a newspaper or a magazine. But the same message gains considerable impact when disseminated on a billboard.

In order to compete effectively with other mass media which offer advertising in standard formats measured in seconds or page size, billboards are now principally constructed in three standard size formats. An advertiser may purchase 12' x 24' poster panels that are posted monthly with pre-printed copy that is temporarily affixed to the panel surface. These signs usually are strategically dispersed in permitted zones throughout a geographic market area. The industry also constructs 14' x 48' bulletins which are located more selectively on heavily travelled streets and highways and are hand painted for each message. In ad-

dition, some outdoor advertising companies offer 6' x 12' "junior panels" that are posted mostly with pre-printed copy. "Junior panels" usually are concentrated in urban areas.

The outdoor advertising industry also has developed a sophisticated method of audience analysis that is analogous to broadcast audience ratings systems and newspaper and magazine circulation statistics. This enables each outdoor advertising company to determine the size and demographic characteristics of those who view each of its signs. With this data, the outdoor advertising industry is able to compete with the other "measured media" by selling billboards in packages which will provide an advertiser with a specific number of potential exposures or "Gross Rating Points" within a given market. Advertising Age, "Out-of Home Media Supplement" (March 10, 1980). For example, political candidate Smith may purchase a preaudited package of poster panels that will provide a potential exposure for "Vote for Smith—The People's Choice" to audiences of from ten to one hundred percent of the population in a particular geographic market between the ages of 18-55 years.

Moreover, because billboards often can be used to target portions of a market, they are often regarded as more "efficient" than other media, which generally can only deliver a message market-wide. If Candidate Smith only wants to reach the residents of Ward 3 of a city, he can target those residents by only advertising his message on billboards that are oriented to traffic in that portion of the city. Thus, in order to remain viable and compete effectively with alternative media, an outdoor advertising company must

maintain a sufficient number of signs to meet the diverse needs of a substantial number of advertisers.

B. Intense Regulation of The Outdoor Advertising Industry Has Substantially Affected Competition In the Industry

Earlier in this century, billboards proliferated in a largely unregulated environment. Few other competing mass media were in existence. Since then, an intensive regulatory structure has developed on all governmental levels which has dramatically reduced the number of billboards and resulted in a concentration of ownership within the outdoor advertising industry. In addition, other mass media have become significant competition.

In 1965, the Congress enacted the Highway Beautification Act, 23 U.S.C. sec. 131 (1965), which imposes substantial penalties upon any state that fails to adopt minimum controls over those billboards contiguous to the federal-aid primary and interstate highway systems. These systems comprise the nation's principal highway arteries. The Highway Beautification Act requires states to confine billboards to commercial and industrial areas and to adopt additional restrictions controlling size, the spacing between adjacent billboards and the manner in which they are illuminated. Finally, the Act requires, that upon payment of just compensation, the states must remove those nonconforming billboards which do not otherwise conform to the federal minimum regulations. 23 U.S.C. 131(g). Although the Highway Beautification Act sets a baseline standard, the states are free to adopt more rigorous standards and to regulate the remaining billboards along other roads that do not fall within the ambit of the Act. 23 U.S.C. 131(k).

Every state has adopted regulations that comply with the requirements of the Highway Beautification Act. In fact, many states have gone beyond the requirements of the Act to implement far more rigorous constraints. For example, Hawaii, Vermont and Maine have chosen to prohibit all outdoor advertising. *See, e.g.,* Hawaii Rev. Stat. sec. 445-111; Me. Rev. Stat. Ann. tit. 23, sec. 1901; Vt. Stat. Ann. tit. 10, sec. 14. By the mid-1970's these states had eliminated virtually all billboards within their boundaries through condemnation and payment of just compensation. However, most states have recognized the importance to society of maintaining the outdoor medium of expression and have chosen to regulate billboards with varying degrees of severity. Oregon, Texas and Rhode Island each have fixed the total number of signs that they will allow and have created certain vested rights in the owners of those signs to the underlying sign permits. *See, e.g.,* Or. Rev. Stat. sec. 377.700; Tex. Stat. Ann. art. 6674-v (Vernon). Other states have imposed very rigorous spacing requirements or have prohibited billboards from certain highway systems within their boundaries. *See, e.g.,* Cal. Sts. & Hy. Code sec. 260.

The most comprehensive regulation of billboards occurs through zoning actions by municipal and county governments. In some cities billboards are a prohibited use. However, the vast majority of zoning ordinances in the United States include sign codes which closely regulate billboards, as well as political signage and on-premise business signage.³ *See, e.g.,* Bakers-

³ An "on-premise" sign advertises goods or services offered for sale on the premises where the sign is located.

field, Cal., Ordinance, ch. 17.60, sec. 91.5201; Los Angeles, Cal., Municipal Code sec. 91.5201; Code of the City of West Palm Beach, Fl., ch. 53.22.8. These very precise restrictions specify the zones in which billboards are permitted and the manner in which they can be sited and constructed. These local codes also prescribe height limitations and minimum standards regarding spacing and street set backs. Often these siting criteria will differ in severity from zone to zone, based upon the locality's perception of the intrinsic character of each zone.

This stringent regulatory structure has sharply limited the number of potential locations where billboards are a permitted use and has effectively ended billboard proliferation.⁴ As result, the number of billboards in the United States has dropped dramatically. Between 1965 and 1989, the number of billboards along federal-aid primary and interstate highways alone was reduced from 1.1 million to 390,291. See Federal Highway Administration Annual Statistical Report, Outdoor Advertising Control Program (September 30, 1989).

This intense regulatory pressure has also had a decisive impact on competition within the outdoor advertising industry, as many companies found they were no longer able to maintain a sufficient number of billboards to provide market coverage to their

⁴ The vast majority of potential sites where billboards are permitted are not viable billboard locations, principally because there is no room to accommodate the structure supporting a sign, visual clutter from buildings or on-premise signs blocks the view of the billboard and renders the site unusable or the site owner simply does not wish to have any collateral use conflicting with the principal land use.

clients. In turn, as billboards came to be regarded as an increasingly scarce resource, many billboard owners determined that they could secure a better return on their investment by selling their companies to a competitor, rather than continuing in business. In 1965, there were 7,400 outdoor advertising companies in the United States. By 1989, there were fewer than 350 companies remaining. The toll of regulation is strikingly evident in some geographic markets where three or more outdoor advertising companies may have existed twenty years ago and only one or two are now in operation.

II. The Potential of the Vague Standards Adopted By The Fourth Circuit To Chill Lawful Activity By Outdoor Advertising Companies and Others In Petitioning The Government

A. The Deficiencies of the Fourth Circuit Tests are Readily Apparent When Viewed In Terms Of The Impact On Outdoor Advertising Companies

The decision by the Fourth Circuit below found that there was sufficient evidence to support a jury finding that the City of Columbia, South Carolina had engaged in a "conspiracy" with Columbia Outdoor Advertising, Inc. ("COA") to violate Sections 1 and 2 of the Sherman Act, 15 U.S.C. secs. 1 & 2 (1890). The Fourth Circuit also found that the evidence supported a finding that the actions of COA in petitioning the government were a "sham," stripped of immunity under the *Noerr/Pennington* and *Parker v. Brown* doctrines.

The OAAA does not take a position on the merits of the instant case. Rather, the OAAA wishes to focus this Court's attention on the OAAA's belief that the standards of illegality adopted by the majority opinion

of the Court of Appeals are so vague and imprecise as to make it impossible for outdoor advertising companies and other parties with interests in land use regulation to ascertain when petitioning the government sheds its First Amendment protections and becomes a violation of the Sherman Act. The OAAA urges this Court to adopt a clear standard that establishes that acts of petitioning and negotiating with the government which are not otherwise illegal, corrupt or coercive are protected from antitrust attack by the *Noerr/Pennington* doctrine.

In his dissent, Judge Wilkinson states that there was no evidence that COA employees threatened or intimidated anyone or used coercive tactics, or that there was any deception or misrepresentation to secure passage of the billboard ordinances, or that there was any illegal conduct such as bribery, coercion or kickbacks, or that the Mayor or any member of the City Council stood to make any personal gain by passing billboard ordinances, or that there was any selfish or corrupt motive. *Omni Outdoor Advertising, Inc. v. Columbia Outdoor Advertising, Inc.*, 891 F.2d at 1146 (Wilkinson, J., dissenting). In addition, Judge Wilkinson found that the evidence did not support a conclusion that the actions of COA had sunk to the level of a "sham." *Id.* at 1146-48.

Judge Wilkinson suggested that the Fourth Circuit decision would,

give those who lose political battles a ticket to explore the subjective motivations of political decision-makers by filing federal anti-trust suits in which it is alleged that private meetings took place, that a personal friend-

ship between the officials and the plaintiff's competition existed, and that an anti-competitive regulation was enacted.

Id. at 1149.

Judge Wilkinson's concerns are well placed. Moreover, the OAAA believes that the Fourth Circuit majority's "conspiracy" and "sham" tests are stated so broadly that a potential new entrant or other third-party who was not even in existence at the time of a particular enactment might attempt to mount a Sherman Act challenge years after its passage. The risks and uncertainties inherent in the Fourth Circuit's "conspiracy" and "sham" standards are such that they will have a chilling effect on what until now have been governmental relations activities considered protected by the First Amendment.

B. The Fourth Circuit's Decision Undercuts the Process of Legislative Compromise and Negotiation

Despite the sharply limited number of billboards nationwide and the existence of a comprehensive regulatory structure, outdoor advertising companies are still assaulted by proposals that would seriously compromise or completely undercut their ability to maintain sufficient signs to continue their competitive operations. Some regulatory proposals go further and simply attempt to force outdoor advertising companies to remove their otherwise lawful billboards within a specified time period without any payment of just compensation whatsoever. *See, e.g., Raleigh, N.C., City Code secs. 10-2065 & 10-2066.*

As a result, outdoor advertising companies have an intense interest in the political process and are active in petitioning the government on all levels. Most out-

door advertising companies closely monitor political and legislative matters and maintain an active liaison with the city and county councils, mayors and the state legislative and executive branches simply as a matter of self-preservation.

The Fourth Circuit opinion is stated in such expansive terms that it casts a serious pall over actions aimed at procuring favorable government action which heretofore have been considered protected by the First Amendment. Often successful government relations activity in an area like billboard control may result in some compromise that nonetheless entails some further restrictions. It is not unusual for such a measure to include an increase in the required minimum spacing between signs. Such an increase in minimum sign spacing has the tendency to foreclose potential new entrants. This apparently occurred in the instant case. Even if there was no direct intent to exclude a potential competitor, the addition of any new restrictions would in some sense solidify the relative competitive position of the surviving companies. Given this context, the Fourth Circuit's vague "conspiracy" and "sham" tests place outdoor advertising companies and other regulated industries in limbo, without a clear sense of when otherwise lawful efforts to petition government become "abusive," short of some overt illegality such as bribery.

C. The Fourth Circuit's "Conspiracy" and "Sham" Standards Will Have a Particularly Severe Impact On the Ability of Private Parties and Government to Compromise Disputes

The Fourth Circuit decision creates a difficult choice for any company faced with a new regulatory initiative. Does a company facing proposed regulation en-

gage in a dialogue with government in order to shape the proposal to protect its interests and risk later antitrust attack or does the company remain passive and risk that the final government action will damage its interests in a way that might have been prevented? The seriousness of this dilemma is evident when it is considered in the context of the threat the Fourth Circuit's decision poses to those outdoor advertising companies that have succeeded in developing a basis for compromise with localities with respect to the control of outdoor advertising.

In the past, many disputes over billboard regulation quickly degenerated into protracted litigation over the validity of a measure which restricted or prohibited billboards within a jurisdiction. Indeed, many of these cases have burdened the courts and a considerable number have been the subject of petitions for certiorari or appeals to this Court. *See, e.g., Metro-media, Inc. v. San Diego, supra; Major Media of the Southeast, Inc. v. City of Raleigh*, 621 F. Supp. 1446 (E.D.N.C. 1985), *aff'd*, 792 F.2d 1269, (4th Cir. 1986), *cert. denied*, 479 U.S. 1102 (1987).

However, in recent years, a perceptible change has occurred in the way many of these disputes are being resolved. Increasingly, through constructive and non-adversarial government relations efforts, outdoor advertising companies are finding a willingness on the part of local and state governments to devise meaningful long range solutions through negotiation and compromise. As a result, a broad spectrum of localities and states have enacted billboard legislation that incorporates such compromise provisions negotiated between these parties. *See, e.g., Cincinnati, Ohio, Municipal Code, ch. 855; Buffalo, N.Y., Ordinance, ch.*

LXX, sec. 17(h). Indeed, some of these measures are actually embodied in formal agreements between the parties and are entered as consent decrees to settle litigation. See, e.g., *Ackerley Communications v. City of Seattle*, No. 857010 (King County [Washington] Superior Court, November 30, 1980); *Patrick Media Group, Inc. v. City of Lakewood, Ohio*, No. 88-0309 (E.D. Ohio, Feb. 9, 1988); *Heritage Creative Outdoor Services, Inc. v. Mayor of New Castle*, No. 87-166 (D. Del., March 16, 1988); *Reagan Outdoor Advertising v. Montgomery County*, No. 48285 (Montgomery County [Maryland] Circuit Court, April 11, 1990).

There is no single set of circumstances in which these measures arise. They may be the product of discussions with all competing outdoor advertising companies within a particular jurisdiction acting jointly, they may reflect the varying and possibly inconsistent positions of several companies in the market or they may arise in a market where only one outdoor company is in operation. The substance of these compromise measures also varies considerably. Some simply establish more rigorous spacing requirements or delineate certain particularly sensitive areas in otherwise permissible zones where billboards are to be prohibited. Other measures establish a specific numerical limit on the number of billboards that can be maintained in a jurisdiction or provide a company with a vested right in its remaining permits as an incentive to remove lawful nonconforming signs to conforming locations.

Inevitably, compromise agreements of this character in the land use area may have some arguable impact on present or potential competition. Given these circumstances, the Fourth Circuit decision in

the instant case casts serious doubt over the ability of localities and outdoor advertising companies to continue on this very productive course which, until now, seemed to be precisely the type of activity that the Court sought to engender through the *Noerr/Pennington* and *Parker v. Brown* doctrines.

In order to achieve any compromise in a legislative context, parties to a dispute must work closely together and engage in a candid exchange. The essence of the legislative process is to find a basis for compromise which advances the commercial purposes of the outdoor advertising company as well as the regulatory interest of the governmental entity. It is now unclear how to participate in such a process without inadvertently creating exposure to subsequent anti-trust attack, perhaps years after the event.

Under the Fourth Circuit's "sham" and "conspiracy" formulations it is simply not possible for a private party or governmental agency to know when effective and lawful government relations activity forfeits its First Amendment protections and metastasizes into an economic abuse which violates the antitrust laws, even where some specific overt illegal act is absent. Virtually every legislative compromise has elements of a "conspiracy" to create a competitive advantage that the Fourth Circuit found so compelling and is vulnerable to a claim that it is a "sham" or "abusive."

CONCLUSION

The decision of the Fourth Circuit has created a great deal of uncertainty as to when otherwise lawful activity related to petitioning government sheds its First Amendment protections under the *Noerr/Pen-*

nington and *Parker v. Brown* doctrines and when such otherwise lawful conduct becomes so abusive that it violates the Sherman Act. This uncertainty is particularly damaging to members of the outdoor advertising industry due to the pervasive regulation of the industry at the local, state and federal level. The Fourth Circuit's "sham" and "conspiracy" standards will undermine the ability of outdoor advertising companies to negotiate settlements of disputes with government agencies because of the risk that a disappointed actual or potential competitor will use successful negotiations as a basis for bringing an antitrust suit.

The Outdoor Advertising Association of America, Inc. respectfully urges the Court to articulate clear standards establishing when activity related to petitioning the government has immunity under the *Noerr/Pennington* doctrine. OAAA also urges the Court to articulate those standards so that acts of petitioning the government and negotiating with the government which are not otherwise illegal, corrupt or coercive will be protected from antitrust attack. To do otherwise will be to require companies to petition or persuade government at the risk that successful persuasion will subject them to substantial antitrust litigation and possible antitrust liability. Such a result would be inconsistent with the First Amendment right to petition the government and would discourage companies from attempting to reach compromises with government on issues of public importance. Thus, OAAA urges this Court to reaffirm the principal that petitioning the government, even if based solely on an anticompetitive motive, is not a violation of the federal antitrust laws, unless there

has been illegal, corrupt or coercive conduct. *Noerr*, 365 U.S. at 189.

Respectfully submitted,

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